United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOANNE CONWRIGHT,

Plaintiff,

v.

CITY OF OAKLAND, et al.,

Defendants.

NO. C09-2572 TEH

ORDER GRANTING DEFENDANT CITY OF OAKLAND'S MOTION TO DISMISS

This matter comes before the Court on Defendant City of Oakland's motion to dismiss seven causes of action from the amended complaint. After carefully reviewing the parties' written arguments, the Court concludes that oral argument is unnecessary and VACATES the hearing scheduled for September 13, 2010. The Court now GRANTS the City's motion for the reasons discussed below.

BACKGROUND

Plaintiff Joanne Conwright, an African-American female "over the age of 50," alleges that she was unlawfully "forced into retirement" after nearly nineteen years of employment by Defendant City of Oakland, most recently as the administrative services manager for the business services division of the City's Community and Economic Development Agency ("CEDA"). First Am. Compl. ("FAC") ¶ 6. She alleges that she was harassed by Defendant Jeffery Robinson, a temporary employee hired for three months in January 2008. Robinson's behavior allegedly included:

> following [Conwright] around in the office, appearing in her office unannounced and uninvited with no reason or justification, interrupting her during staff meetings, coming to her office three to four times a day, winking, and leering at Ms. Conwright, persistently asking Ms. Conwright if she had work for him to do,

United States District Court
For the Northern District of California

> constantly saying "hello" two to three times a day, making Ms. Conwright uncomfortable, questioning Ms. Conwright about her whereabouts, and schedule.

Id. ¶ 7.

Conwright complained about Robinson's behavior to Sandra Smith, Robinson's supervisor, on March 10, 2008. One week later, she reported the behavior to Defendant Cheryl Hall Tongue, CEDA's human resources manager. The following day, she discussed the alleged harassment with Smith and Robinson, and she subsequently reported the harassment to Assistant City Administrator Cheryl Thompson.

Notwithstanding Conwright's complaints, Robinson's employment was extended by one month on March 28, 2008, and he was assigned to work in the same building as Conwright. As a result:

> Ms. Conwright was overwhelmed with fear and emotional distress and reported to defendants Ray Derania [deputy director of building services for CEDA] and Antoinette Renwick [inspection services manager for CEDA] [that] she feared Robinson and felt he would do anything to keep his employment. Ms. Conwright reported to Derania and Renwick that Robinson's continued presence in the same building inhibited her egress and entry into her office and her use of the elevator and other common areas.

Id. ¶ 9. Following her reports, Conwright was sent home. Later that evening, she became physically ill.

On April 1, 2008, Derania demoted Conwright "by overriding personnel decisions [and] reassigning her responsibilities." *Id.* ¶ 9.1.[1] Conwright filed a workers' compensation claim the following day and also "continued under doctor's care." *Id.*

Conwright contends that Derania and Renwick continued "a series [of] harassment" against her for the next year, until she "was forced to resign on March 31, 2009." *Id.* ¶ 10. For instance, Defendants continued to demote Conwright by assigning her duties to Renwick and Smith, who were allegedly lesser qualified, and instructing Conwright "not to inquire about any of her duties being handled by others." *Id.*

---

[1]The FAC contains two paragraph number 9's. This citation refers to the second of those two paragraphs.

United States District Court
For the Northern District of California

> Derania then ostracized Ms. Conwright and her work product began to disappear, and Derania made unprofessional and false accusations about Ms. Conwright['s] work performance. Ms. Conwright was excluded [from] budget meetings, the Building Services Master Fee Schedule was deleted from the shared drive[,] and Derania falsely claimed Ms. Conwright incorrectly input information. Ms. Conwright was forced to do the same work again[,] and again her work was deleted. Derania falsely accused [Ms.] Conwright of creating a hostile work environment. Derania engaged in and encouraged other staff to engage in harassing Ms. Conwright including claiming "they" were regaining control [of] administrative procedures and that Ms. Conwright had too much authority. He then instigated rumors that Ms. Conwright was seeking to retaliate when in fact he was engaging in acts of retaliation against Ms. Conwright for reporting sexual harassment and filing a worker's compensation claim.

Id.

Conwright filed this case on her own behalf on June 10, 2009. She subsequently obtained counsel and filed an amended complaint on January 25, 2010. The City's motion to dismiss the following seven causes of action from the amended complaint is now before the Court: age discrimination; disability discrimination; violation of California Labor Code section 1102.5; violation of public policy; violation of Article I, section 8 of the California Constitution; constructive termination in violation of public policy; and defamation.[2] The City does not seek dismissal of Conwright's sexual harassment, hostile work environment, or retaliation causes of action.

LEGAL STANDARD

Dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(6) when a plaintiff's allegations fail "to state a claim upon which relief can be granted." In ruling on a motion to dismiss, courts may consider only "the complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice." *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008). Courts must

[2]The ninth cause of action is entitled "violation of public policy," while the eleventh is entitled "constructive termination of public policy." Both appear to be based on the same allegations: that the City "demoted, ostracized, and constructively discharged Plaintiff, forcing her to retire," and that these "adverse actions against Plaintiff [were] in violation of Public Policy." FAC ¶¶ 44, 50.

United States District Court
For the Northern District of California

generally "accept all material allegations of fact as true and construe the complaint in a light most favorable to the non-moving party," *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007), but "are not bound to accept as true a legal conclusion couched as a factual allegation," *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009) (citation omitted).

A Rule 12(b)(6) dismissal "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 550. Plausibility does not equate to probability, but it requires "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S. Ct. at 1949. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Dismissal of claims that fail to meet this standard should be with leave to amend unless it is clear that amendment could not possibly cure the complaint's deficiencies. *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998).

DISCUSSION

I. Age Discrimination

The City first moves to dismiss Conwright's fifth cause of action for age discrimination. The FAC alleges that "at the time of [the] acts alleged herein [Conwright] was over the age of 50." FAC ¶ 6. It further alleges, in the most conclusory fashion, that Conwright "was subject to adverse employment action because of her age," *id.* ¶ 28; "was forced to retire because of her age," *id.* ¶ 29; and "suffered discrimination from Defendant because of her age," *id.* ¶ 30. These allegations are insufficient to state a plausible claim of age discrimination, and the Court therefore GRANTS the City's motion to dismiss this cause of action. Dismissal is with leave to amend because it is not clear that Conwright cannot

United States District Court
For the Northern District of California

allege facts sufficient to state a claim. If she chooses to amend this cause of action and allege the specific facts on which she relies, Conwright shall also identify the statutes under which she claims unlawful age discrimination.

II. Disability Discrimination

The City next moves to dismiss Conwright's seventh cause of action for disability discrimination. Conwright does not dispute that exhaustion of administrative remedies is required under Title I of the Americans with Disabilities Act ("ADA") or under California's Fair Employment and Housing Act ("FEHA"), but she does contend that she need not exhaust administrative remedies under Title II of the ADA. However, the case relied on by Conwright to support this position – *Petersen v. University of Wisconsin Board of Regents*, 818 F. Supp. 1276 (W.D. Wis. 1993) – was explicitly rejected by the United States Court of Appeals for the Ninth Circuit, which concluded that "Title II does not apply to employment." *Zimmerman v. Or. Dep't of Justice*, 170 F.3d 1169, 1183 n.13 & 1184. (9th Cir. 1999).[3] Accordingly, although the complaint is unclear as to whether Conwright's disability discrimination cause of action relies on state or federal law, Conwright was required to exhaust administrative remedies in either case.

"The scope of the written administrative charge defines the permissible scope of the subsequent civil action. Allegations in the civil complaint that fall outside of the scope of the administrative charge are barred for failure to exhaust." *Rodriguez v. Airborne Express*, 265 F.3d 890, 897 (9th Cir. 2001) (citation omitted). The relevant question is whether "the allegations in the civil suit are within the scope of the administrative investigation which can reasonably be expected to grow out of the charge of discrimination." *Id.* (internal quotations and citation omitted).

---

[3]The Ninth Circuit has subsequently narrowed *Zimmerman* to cases where, as here, the employee alleges discrimination based on his or her own disability. In *Barker v. Riverside County Office of Education*, 584 F.3d 821, 828 (9th Cir. 2009), the Ninth Circuit distinguished *Zimmerman* and held that an employee who alleged discrimination based on advocating for disabled students receiving allegedly inadequate services under Title II could state a claim for employment discrimination under Title II.

United States District Court
For the Northern District of California

In this case, Conwright filed complaints of discrimination with the California Department of Fair Employment and Housing ("DFEH") against the City, Robinson, and Hall Tongue on July 9, 2008. Exs. 1-3 to Def.'s Req. for Judicial Notice.[4] These complaint forms instruct the complainant to "check appropriate box[es]" for the "cause of discrimination." *Id.* Conwright checked the boxes for sex, age, and retaliation but not for disability. *Id.* The narrative on each complaint is identical and states the following:

> I. During the course of my employment as an Administrative Services Manager, I was harassed by Temporary Agency Employee, Jeffrey B. Robinson. The Harassment occurred during the period January 1, 2008 to March 26, 2008. I was suspended from work on April 8, 2008.
>
> II. Cheryl Hall Tongue, Human Resources Manager instructed me to go home on March 26, 2008.
>
> III. I believe that I was harassed, which is discrimination on the basis of sex, female and age (62), and also I believe that I was suspended from work in retaliation for complaining about the discrimination for the following reasons:
>
> A. During the period of January 1, 2008 to April 8, 2008, I was harassed by Temporary Agency Jeffrey B. Robinson. The harassment was of verbal/visual nature (details on files with DFEH) and occurred daily. The harassment created a hostile work environment.
>
> B. All my authority as an Administrative Services Manager was removed from me and Antoinette Renwick Inspection Manager stated they were placating me, because they wanted to replace me with Manager Assistant Sandra Smith.
>
> C. I was sent home by Human Resources Manager Cherry Hall-Tongue [sic] on March 26/28, 2008, and by Risk Manager Debbie Grant on April 8, 2008.
>
> D. On June 16, 2008, I was suspended effective June 23, 2008 to June 27, 2008, in retaliation for complaining about discrimination.

Id. The DFEH complaints were forwarded to the United States Equal Employment Opportunity Commission ("EEOC"), which issued a notice of charge of discrimination under

[4]The City's unopposed request for judicial notice is GRANTED in its entirety.

United States District Court
For the Northern District of California

Title VII, but not under the ADA or the Age Discrimination in Employment Act, based on sex, age, and retaliation on July 23, 2008. Ex. 4 to Def.'s Req. for Judicial Notice.

Conwright contends that an investigation into her DFEH complaints would have included her disability claims because the discrimination alleged in the complaints gave rise to a workers' compensation claim based on "stress disability." Opp'n at 10. However, as the City correctly observes, the definition of "disability" for workers' compensation purposes is not co-extensive with the definition under anti-discrimination statutes. *See City of Moorpark v. Super. Ct.*, 18 Cal. 4th 1143, 1158 (1998). Moreover, even if a reasonable investigation might have revealed that Conwright had filed a workers' compensation claim, Conwright's administrative complaints do not contend that she was discriminated against on the basis of filing such a claim. The Ninth Circuit has concluded that, even when construed liberally, allegations of race discrimination "would not reasonably trigger an investigation into discrimination on the ground of disability. The two claims involve totally different kinds of allegedly improper conduct, and investigation into one claim would not likely lead to investigation of the other." *Rodriguez*, 265 F.3d at 897. The same reasoning holds true for Conwright's claims based on age and sex discrimination, and retaliation for complaining about age and sex discrimination: "It would not be proper to expand the claim . . . when the difference between the charge and the complaint is a matter of adding an entirely new basis for the alleged discrimination." *Id.* (internal quotations and citation omitted). Accordingly, this Court concludes that Conwright has failed to exhaust her administrative remedies as to a disability discrimination claim, and the City's motion to dismiss this claim is GRANTED without leave to amend.

III. Claims Eight Through Twelve

The City next moves to dismiss claims eight through twelve from the FAC because these causes of action seek money damages from the City and the complaint fails to allege that a claim was presented to the City. Under California law, a plaintiff may not bring a suit seeking money or damages from a public entity until he or she has presented a written claim

United States District Court
For the Northern District of California

to the entity and has had that claim acted upon or deemed rejected. Cal. Gov't Code § 945.4. In cases of personal injury, such claims must be presented "not later than six months after the accrual of the cause of action." Cal. Gov't Code § 911.2. A "plaintiff must allege facts demonstrating or excusing compliance with the claim presentation requirement. Otherwise, his complaint is subject to [dismissal] for failure to state facts sufficient to constitute a cause of action." *California v. Super. Ct.*, 32 Cal. 4th 1234, 1243 (2004).

Conwright argues that she was not required to submit a government claim under FEHA, but the City has not moved to dismiss Conwright's FEHA claims on this basis. Instead, the City contends only that Conwright was required to file a claim for money damages before filing suit for violation of California Labor Code section 1102.5, violation of public policy, violation of the California Constitution, constructive termination in violation of public policy, and defamation.

Conwright also asserts that "the complaint can be amended to clearly state a Notice was served" and that "Defendant waived notice by their actions and are estopped from relying on the [claim presentation requirements]." Opp'n at 10. She thus concedes that the complaint fails to "allege facts demonstrating or excusing compliance with the claim presentation requirement," and the Court therefore GRANTS the City's motion to dismiss claims eight through twelve. *California v. Super. Ct.*, 32 Cal. 4th at 1243. Although the opposition is vague as to what she would allege if given leave to amend, it is not clear that Conwright could not amend her complaint to allege either that she adequately presented a written claim for damages or that she should be excused from doing so. Consequently, leave to amend is granted.

The Court now addresses the City's remaining arguments to determine whether any of claims eight through twelve should be dismissed with prejudice on other grounds, or whether any of the City's arguments suggest shortcomings that should be addressed by amendment.

A. Claims Based on Public Policy

Conwright's ninth and eleventh causes of action allege liability by the City for violation of public policy. Wrongful termination in violation of public policy is a common

United States District Court
For the Northern District of California

law cause of action judicially created by *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167 (1980), in which the California Supreme Court stated that, "when an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." *Id.* at 170. California Government Code section 815 "abolishes common law tort liability for public entities" and therefore "bars *Tameny* actions against public entities." *Miklosy v. Regents of the Univ. of Cal.*, 44 Cal. 4th 876, 899-900 (2008). Although Conwright attempts to distinguish *Miklosy* by asserting that the claims in that case were not based on FEHA violations, she presents no authority or argument, and this Court can find none, for excluding FEHA-based claims from *Miklosy*'s bar on public policy claims against public entities. Consequently, the City's motion to dismiss the ninth and eleventh causes of action is GRANTED without leave to amend.

In its reply papers, the City also moved to dismiss Conwright's fourth cause of action as improperly based on allegations of a public policy violation. The Court will not consider a motion brought only on reply, but Conwright is advised to consider, when amending her complaint, whether it would be proper to modify her fourth cause of action in light of the Court's rulings in this order.

B. Violation of Article I, Section 8 of the California Constitution

The City cites *Lloyd v. County of Los Angeles*, 172, Cal. App. 4th 320 (2009), for the proposition that Conwright's tenth cause of action for violation of Article I, section 8 of the California Constitution must be dismissed. However, *Lloyd* involved a claim based on retaliation in violation of the public policy contained in the state constitution, *id.* at 328-29 & n.3, whereas Conwright appears to be alleging a violation of the constitutional provision itself. Accordingly, dismissal based on *Lloyd* would be improper.

C. Defamation

Finally, "defamation involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage." *Taus v. Loftus*, 40 Cal. 4th 683, 720 (2007) (internal quotations and citation omitted). The

United States District Court
For the Northern District of California

City contends that dismissal of Conwright's defamation claim is proper because the common interest privilege – which applies to a communication between persons with common interests if made "without malice," Cal. Civ. Code § 47(c) – applies to communications between employees. *See, e.g., King v. United Parcel Serv., Inc.*, 152 Cal. App. 4th 426, 440 (2007) (privilege applies to "an employer's statements to employees regarding the reasons for termination of another employee"); *Kelly v. Gen. Tel. Co.*, 136 Cal. App. 3d 278, 285 (privilege applies to "[c]ommunication among a company's employees that is designed to insure honest and accurate records"). The City further contends that dismissal should be granted because a one-year statute of limitations applies to defamation claims, Cal. Civ. Proc. Code § 340(c), and the complaint is vague as to the time when the allegedly defamatory statements were made.

Conwright does not dispute the one-year statute of limitations or that the allegedly defamatory statements were made between persons who shared a common interest. Conwright argues only that her defamation claims should be dismissed because she has sufficiently alleged malice, thus bringing the statements outside the protections of section 47(c). However, a "general allegation of malice will not suffice" to defeat this privilege; a "plaintiff must specifically allege malice" with "detailed facts showing defendant's ill will toward him." *Robomatic, Inc. v. Vetco Offshore*, 225 Cal. App. 3d 270, 276 (1990) (citations omitted) (affirming grant of judgment on the pleadings). Conwright points to no allegations in the complaint that specifically allege malice, nor does she assert that the complaint sets forth the dates when the statements were allegedly made. It is not clear that these deficiencies cannot be cured by amendment, and Conwright is directed to correct these deficiencies if she wishes to continue to pursue a defamation claim in her amended complaint.

CONCLUSION

As discussed above, Defendant City of Oakland's motion to dismiss the fifth and seventh through twelfth causes of action is GRANTED. The seventh cause of action for

disability discrimination, the ninth cause of action for violation of public policy, and the eleventh cause of action for constructive termination in violation of public policy are dismissed with prejudice. Leave to amend is granted on all other causes of action. Conwright shall file an amended complaint on or before **October 8, 2010.** Failure to file a timely amended complaint shall result in dismissal with prejudice of the fifth, eighth, tenth, and twelfth causes of action from Conwright's first amended complaint against the City.

IT IS SO ORDERED.

Dated: 09/08/10

THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

United States District Court
For the Northern District of California